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No. 15738

United States
COURT OF APPEALS
for the Ninth Circuit

JAMES BUTLER ELKINS and
RAYMOND FREDERICK CLARK,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF

Appeal from the Judgment of the United States District Court for the District of Oregon.

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PAUL P. O'BRIEN, CLER

WALTER H. EVANS, JR. and
BURTON J. FALLGREN,
Public Service Building,
Portland, Oregon,
Attorneys for Appellants.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE., 1-59

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I. PRELIMINARY STATEMENT

We believe that the issue as to "interception" is so clearly delineated and so vital to the Government's case that we have taken the liberty of discussing this point first and will thereafter reply to certain of the other contentions of the Government

II. REPLYING TO GOVERNMENT'S ARGUMENT ON INTERCEPTION

(Point III F (judgment of acquittal) and Point V (sufficiency of the evidence), Appellee's Brief, pages 44 to 50 and 51 to 53)

The keystone of the Government's case is its argument as follows: Recordings sounding like telephone conversations were seized in Clark's possession accompanied by handwritten notes on the contents in Clark's handwriting. Witnesses listened to these conversations and identified them as actual conversations held by telephone and testified that none had consented to his conversations being recorded or "intercepted"; that a hole was found in the wall between Elkins' apartment and Maloney's apartment and that Elkins and Clark made statements to the witness Erickson incriminating themselves as to "recordings of telephone conversations" at Maloney's apartment (Appellee's Br 51-53).

This is the sum and substance of the Government's case on "interception," and on conspiracy to "intercept."

There was no evidence of the "means" by which this claimed "interception" was brought about although the indictment "carefully" alleged that a

> "Recording device would be connected to lines intercepting the telephone lines of Thomas E. Maloney . . ." (Tr. of Rec. Vol. I, No. 3, paragraph 2, page 11).

There was *no evidence whatsoever* of

(a) "a connection,"

(b) existence of "lines,"

(c) location of "lines,"

(d) "intercepting" of Maloney's telephone wires "by lines," or otherwise.

We have read and reread the 2540 pages of transcript herein and we invite counsel on his oral argument to point out any part of the testimony or evidence which detracts from the correctness of the statements made above.

Goldman v. U. S., 316 U.S. 129, 86 L. Ed. 1322, was and is the law on this subject, and holds that to "intercept" means "taking or seizure by the way or before arrival at the destined place" and that "the listening in the next room to the words of Shulman as he talked into the telephone receiver was no more the interception of a wire communication, within the meaning of the Act, than would have been the overhearing of the conversation by one sitting in the same room." (316 U.S. at 134).

The Government's argument amounts to this: Recorded telephone conversations, coupled with lack of consent, permit a finding of "interception" in the statutory sense. But recording of telephone conversations could occur or exist as a result of "eavesdropping" as well as "interception." They could be made by a wall or a room microphone as well as by some device directly and physically connected to the telephone wires, or other physical parts of the system, the means of communication intended to be protected by the statute. Therefore, in such a posture, to make out a case of

"interception," evidence is necessary as to the *means* of "interception."

Where, as in this case, there is no proof or evidence of the means of interception, a finding by the jury of the fact of interception cannot stand for it permits the punishment, as interception, of what is, at best, a case of eavesdropping.

At page 49 of the Government's brief, it is asserted:

> "The fact of, not means of, interception was the proof required."

This statement is misleading because it presupposes interception in the statutory sense. It is only where statutory interception has been conceded that the means of interception becomes immaterial. The real question, under the Government's analysis, would be "How were the recordings secured?" The Government argues they could only be recorded by "intercepting." This *may* or *may not* be true, but not only is there *no* evidence of this assumption in the record, but there is affirmative evidence indicating the tapes were secured by a room microphone. We could just as logically argue that every sound on these tapes can be lawfully reproduced (for example, by use of a conference telephone, a very powerful wall mike, or a combination of both) but the difference is that the Government has the burden of proof.

Again, at page 48 of the Government's brief, it says:

> "A mechanical eavesdropping on a wire communication *as it passes over the wire* is, we submit, an evil Congress intended to proscribe." (Emphasis added).

Again, it is submitted that the foregoing is illusory, and will not stand under careful scrutiny for this statement, of necessity, presupposes that the mechanical device was employed at a point where the communication was "passing over" the wire. That is to say, that it was between the telephone transmitter and the telephone receiver. There is no such evidence in the case at bar.

When we bear in mind that the purpose of the act was to protect the interstate facility (and not the privacy of communication), the above distinction becomes self-evident.

The Court, in its instruction on "interception," first pointed out that "interception" did not necessarily mean preventing the message from arriving at its destination. Then the Court committed error when it also stated, in essence, that a verdict of guilty could be returned if, while the conversation was being made, it was overheard whether by human ear or through electric devices (Tr. Vol. XV, 2502 to 2504 at 2503, quoted in Appellants' Brief at 101).

Despite the Government's ingenious exegesis of this erroneous instruction, we submit that no matter how it is read, whether taken in part or as a whole, it authorized a guilty verdict on nothing more than evidence of eavesdropping. As pointed out in our opening brief, lack of consent is not the equivalent of "interception" and we might add that eavesdropping, though not always commendable, is not, so far as we are aware, a federal offense.

We submit that the only evidence of how the recordings were obtained completely negatives the fact of unlawful interception. This testimony is found from the Government's witness Erickson (Tr. 2143):

> "A. Well, I had the impression that it was a matter of these *wall* recorders picking up the sound of a telephone ringing *over here* and the sound that would be heard if I were speaking on this end and my voice was being carried to the tape recorder or wall recorder or whatever they are. I am not familiar with those.
>
> The Court: As I understand it, that was just your impression from what went on?
>
> The Witness: From the conversation as it took place, yes." (Emphasis added).

And again, Tr. 2167:

> "Q. Was there any care exercised to avoid direct reference to telephone taps and taps—or, interception of telephone communications?
>
> A. *There was no such conversation as to that in front of me.*" (Emphasis added).

(See also: Tr. 2104 and 2166).

The above Erickson testimony demonstrates that any alleged conspiratorial admissions made by either Clark or Elkins related only to eavesdropping recordings and since this is the only evidence relating to how the recordings were secured, the Government's speculative inference that the tapes themselves are evidence of the fact of unlawful interception, is completely unwarranted.

Lastly, we fail to follow the Government's argument (at page 49 of its brief) wherein it states:

"The indictment carefully avoided alleging that

the lines connected to the recorder were physically attached to the telephone wires of Maloney . . ."

The indictment (Tr. of Rec. Vol. I, No. 3, paragraph 2, page 11) reads in part as follows:

"It was a part of the conspiracy that the defendants would have a recording device installed . . . and that this recording *device would be connected to lines intercepting the telephone wires* of Thomas E. Maloney . . ."

What is the significance of this "careful" phraseology? Is the Government now emphasizing that the defendants had nothing to do with any installation of "intercepting" lines? That defendants connected a recorder to some existing lines? We fail to follow the Government's argument on this point and we think it emphasizes the total failure of proof on the fact of unlawful "interception."

III. REPLYING TO GOVERNMENT'S ARGUMENT ON THE CONSTITUTIONALITY OF SECTION 605

(Appellee's Brief, pages 11 and 12)

The Government's brief fails to meet appellants' attack on § 605. It argues that a "fair reading of the statute" delineates the conduct violating the statute and that constitutionality of he statute requires no more.

It is appellants' position that at the "face value" test (laid down by the first Nardone case, 302 U.S. 379, 82 L. Ed. 314, and the Weiss case, *Weiss v. The U. S.*, 308 U.S. 321), "any communication" means simply "any communication" and nothing less.

We believe those opinions themselves furnish the best argument in answer to the Government's charge of "strained semantics and tortured construction." (See quotations from *Nardone* opinion and *Weiss* opinion, Appendix, infra, page 17.)

We also find that in appellants' opening brief we quoted from *U. S. v. Harris* (Appellants' Br. 28) 106 U.S. 629, and inadvertently failed to give credit to the case of *U. S. v. Reese,* 92 U.S. 214, 23 L. Ed. 563, 565-566, from whence the Court quoted in *U. S. v. Harris*. We are returning the portion quoted in appellants' opening brief to its original context in the Appendix, infra, pages 17-18.

We call attention to the fact that all of the cases *but two,* cited by the Government on this point, were considering § 605 from its evidentiary aspects. The two exceptions were *Massicot v. U. S.,* 254 F.2d 58, and *U. S. v. Gris,* 247 F.2d 860. In neither of these cases was this constitutional question raised.

We have no doubt that Congress has the power, and properly may, establish *rules of evidence* for the Federal courts relating to purely intrastate commerce. We readily concede that such rules may be subject to a wide and liberal interpretation, for example, *Sablowsky v. The U. S.,* 101 F.2d 183 at 187, where the Court stated:

> " * * * If the first and third clauses referred to are intended to relate to a phase of regulation as well as to constitute a rule of evidence, the limiting phrase 'interstate or foreign' placed prior to the word 'communication' in both of these

> clauses was aptly used by Congress to bring such regulation within the power of Congress under the Commerce clause. U.S.C.A. Const. Art. 1, § 8, cl. 3. Upon the other hand, the provisions of the second and fourth clauses of Section 605, which upon their face purport to relate to all persons, do not relate to the regulation of communication carriers and therefore constitute a rule of evidence in the purest sense. Congress must be deemed to have exercised its power within constitutional limitations. It possesses power to provide that Federal officers may not divulge intercepted *intrastate* wire communications in a district court of the United States. Such a construction limits the broad language of Section 605 in a manner consistent with the constitutional power of Congress. We therefore may conclude that such was the intention of Congress. * * * " (Emphasis added).

The power of Congress to establish a rule of evidence for the federal courts is quite a different power from that authorizing it to make certain conduct a crime, ~~and~~ Where is Congress' authority to make it unlawful to intercept and divulge "any communication" or to publish or use such intercepted communication knowing the information was so obtained, regardless of whether the communication was by wire, voice, or even smoke signals, and regardless of whether the communication was from one desk to an adjoining desk, or from San Francisco to New York? Again, we say that Congress' power is of necessity, limited to interstate communications or to matters affecting interstate systems and that § 605 is fatally vague.

IV. REPLYING TO THE GOVERNMENT'S ARGUMENTS ON SUPPRESSION OF THE EVIDENCE

(Point III A, Appellee's Brief, pages 19 to 38)

The Government argues (pages 30 to 32) that the appellant Elkins has no standing to challenge the admissibility of the tapes because he "only indirectly asserted ownership."

Counsel has apparently overlooked the motion filed in the Court below on March 25, 1957 (Tr. of Rec., Vol. I, No. XIII, at page 46) where the defendants asked that certain property "of which defendants herein are the owners, a schedule of which is annexed hereto and made a part hereof . . ." etc. The first item on the schedule was "5 electronic tape recordings." When they allege in a formal motion that they are the owners, is this "only indirectly asserting ownership"? We parenthetically observe that the Government's position is, we believe, completely answered by the case of *McDonald v. U. S.*, 335 U.S. 451, 93 L. Ed. 153, where the Supreme Court denied a similar contention of the Government by pointing out that had the motion to suppress been allowed, the evidence would not have been available for any purpose.

Next, we would like to point out that not only has the Supreme Court reserved the question decided by Judge Hastie in the *Hanna* case (*Hanna v. U. S.*, 260 F.2d 723), in the *Benanti* case (355 U.S. 96, Footnote 10), but this Court has likewise reserved the precise question now presented (see *Rios v. U. S.*, 9th Cir. 1958, 256 F.2d 173).

As stated in the appellants' opening brief, this is not a question of supremacy nor a State court interfering with a Federal court. It is the question of whether or not the State court has the right to effectively control its own officers in the execution of its process.

The Government suggests at page 34 of Appellee's Brief that the State court had "exhausted" the State's jurisdiction. Such was certainly not the view of the judge of the State Circuit Court (decision of Judge Lonergan, Ex. F, to Motion for Return, Tr. of Rec., Vol. I, Ex. B, Nos. 13 and 14, pages 66 to 70) (from page 68):

> "Of course, the use of them so far has been illegal, and if the Grand Jury of this County has turned any of that material or any of those things that were taken by this illegal search warrant over to the Government of the United States, the Grand Jury had no authority whatsoever to do anything of the kind. No one has any authority to dispose of that or use it in any way without an order of the Court. No order of the Court that I know of has ever been issued to anyone for that purpose."

The Government again cites *Riggs v. Johnson County,* 73 U.S. 66 (page 28, Appellee's Brief), and urges that the Federal Court, by virtue of this holding, is free from interference by the State Court.

Our reply is to ask this Court to determine which Court is interfering with which Court? Was the State Court interfering with Federal Court by the issuance of the State Court injunction? Or was the Federal Court interfering with State Court by the issuance of Commissioner's process and the taking of the tapes from the custody of the Attorney General and the

State Police? Or by compelling the witnesses to testify and violate the announced and decided policy of the State of Oregon?

The Government asserts that the State officers were not the moving parties in this prosecution because it "was initiated by grand jury indictment" (Appellee's Brief, page 30). We can only point out that the defendants were foreclosed from inquiring as to what part, if any, the State officers did play in the institution of this prosecution by the Court's ruling on executive privilege (M.S. 452, 457, 532, 533, and as to the witness Sherk, 335, 336) (*Jencks v. U. S.*, 353 U.S. 657, 1 L. Ed. 2d 1103).

V. REPLYING TO GOVERNMENT'S ARGUMENT ON THE INDICTMENT

Point II, Appellee's Brief, pages 12 to 18)

We first note what, to the writer, seems to be an anomaly common in federal criminal practice. The Government strenuously resists a demurrer and a motion for a bill of particulars on multiple counts, and then argues that the majority of the counts are immaterial because only two counts are necessary to support the judgment and sentence. We suppose it is within the prerogative of the United States attorney to select as many counts as he wishes, to submit to the grand jury and to plead such counts in all the different alternative forms. We believe, however, that a careful reading of the cases cited by the Government will not sustain their position as to Counts II to IX, inclusive. For example, on Counts

V to VIII, the Government relies on the case of *Johnson v. The U. S.*, 207 F. 2d 314 at 319. In that case the Court was considering a statute which prohibited certain conduct in the *dis*junctive and the indictment charged the defendants in the ~~con~~dis junctive. Such is not the indictment at hand, for a Clause 2 violation requires interception *and* divulgence or publication, and a Clause 4 violation requires the receipt of the communication with knowledge of the interception *and* to divulge or publish or use. We will not further reiterate our argument found at page 11, et seq. of Appellants' Brief.

The Government notes that no alibi was offered (Appellee's Brief, page 14). How could the defendants offer an alibi since no exact date of divulgence was either alleged or proved with the witnesses' estimates running from "late summer" to November of 1955.

In the case of *Norris v. U. S.*, 152 F.2d 808, cited at page 15 of Appellee's brief, the Court discusses the function of the motion for a bill of particulars. However, that case denied it, on the ground that the application had not been timely made and cited as authority for its position the case of *Tubbs v. The U. S.*, 105 F. 59 at 61. In the *Tubbs* case the Court was dealing with a prosecution for sending an obscene letter through the mails. The date of the mailing and the addressee of the envelope were given and the indictment contained the recitation that the contents of the letter were too obscene to be spread on the record. Indeed, in the *Tubbs* case the Court pointed out that the defendant might move for a bill of particulars. In the case at bar the defendants moved for a bill of particulars and the Court denied the same.

VI. REPLYING TO GOVERNMENT'S ARGUMENT RE APPELLANTS' "PARADOXICAL POSITION"

(Appellee's Brief, Point X, pages 57 to 58)

The Government argues that since Justices Holmes and Brandeis, in their dissents in *Olmstead v. U. S.* (277 U.S. 438), labeled wire tapping (in that case performed by the Government) as "dirty business" and a violation of the Fourth Amendment, therefore in cases where, as here, defendants are charged with "wire tapping," this Court should not be unduly concerned about protecting constitutional freedoms (Appellee's Brief, pages 57 to 58).

While this may be an effective jury argument, we cannot follow its logic when urged here. By the same token, is a convicted murderer appealing from a death sentence entitled to no examination of his constitutional rights simply because the jury has found that he has done to someone else what the Government is about to do to him? It seems to appellants that the Government is arguing that appellants have only "second class" constitutional rights.

We think the paradox, if any there be, is in the Government's position. This will become patent when a defendant moves to suppress evidence secured because F.B.I. agents overheard one-half or all of a telephone conversation without any evidence of an "interception." Is the Government going to confess such a defendant's motion to suppress? If so, it is reversing its position urged in *Goldman v. U. S.*, 316 U.S. 129; *On Lee v.*

U. S., 343 U.S. 747; and *U. S. v. Hill* (cited by the Government), 149 F. Supp. 83. See also, *U. S. v. Silverman*, 168 F. Supp. 838.

VII. REPLYING TO APPELLEE'S COMMENT ON APPENDIX

(Point IX, Appellee's Brief, pages 54 to 57)

With respect to the comments and suggestions made in Appellee's brief concerning Appellants' Appendix, we reiterate the statements made in Appellants' Opening Brief at the bottom of page 3 and at the top of page 131. We made every effort to summarize the testimony fairly and accurately and if any of our summary has had the effect of misleading the Court, we sincerely apologize.

We do point out with respect to appellee's criticism of the summary of F.B.I. Agent Sherk's testimony (Appellee's Brief, pages 55-56), that immediately after making the answer quoted by the Government, he stated:

> "A. So the answer is no.
> Q. The answer is no, isn't it?
> A. Yes.
> Q. Are you taking into consideration the fact that the last time you had seen these articles was on August the 13th immediately before September 5, 1956, isn't that correct?
> A. Yes." (M.S. 298).

The original question was whether or not Sherk knew of his own knowledge that the articles seized were in the box at the time he made the affidavit and his final answer was "no."

VIII. CONCLUSION

All other matters mentioned in the Appellee's answering brief, we believe, have been adequately covered by Appellants' opening brief.

Respectfully submitted,

WALTER H. EVANS, JR.,
BURTON J. FALLGREN,
Attorneys for Appellants.

APPENDIX

Nardone, et al v. U. S. (First Nardone case), 302 U.S. 379, at page 381, 82 L. Ed. 314:

> "Taken at face value the phrase 'no person' comprehends federal agents, and the ban on communication to 'any person' bars testimony to the content of an intercepted message. Such an application of the section is supported by comparison of the clause concerning intercepted messages with that relating to those known to employes of the carrier. The former may not be divulged to any person, the latter may be divulged in answer to a lawful subpoena. . . ."

In *Weiss v. United States* (1939), 308 U.S. 321, 329, 84 L. Ed. 298, 302, the Supreme Court said:

> "The government further contends that the Act, viewed as a whole, indicated an intent to regulate only interstate and foreign communication. The title and §§ 1 and 2, 47 USCA §§ 151, 152, with a single exception which serves to emphasize the distinction, expressly so declare. But we think these considerations are not controlling in the construction of § 605. The Commission's regulatory powers and administrative functions have to do only with interstate and foreign communications. But § 605 delegates no function and confers no power upon the Commission. It consists of prohibitions, sanctions for violation of which are found in § 501. *We hold that the broad and inclusive language of the second clause of the section is not to be limited by construction so as to exclude intrastate communications from the protection against interception and divulgence.*" (Emphasis supplied)

In *U. S. v. Reese,* 92 U.S. 214, at 221, 23 L. Ed. 563, at 565, the Court said, in part:

" * * * We are, therefore, directly called upon to decide whether a penal statute, enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the constitution. The question, then to be determined is, whether we can introduce words of limitation into a penal statute as to make it specific, when, as expressed, it is general only.

It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the Government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme and beyond the control of the courts; but if it steps outside of its constitutional limitation and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachment upon the reserved power of the States and the people.

To limit this statute in the manner now asked

for would be to make a new law, not to enforce an old one. This is no part of our duty.

We must, therefore, decide that Congress has not as yet provided by 'appropriate legislation' for the punishment of the offense charged in the indictment; and that the circuit court properly sustained the demurrers and gave judgment for the defendants.

This makes it unnecessary to answer any of the other questions certified. * * *"